Chapter 1

Nationality, Citizenship, and Immigration

A. NATIONALITY AND CITIZENSHIP

1. Non-citizen Nationals: Taiwan Claimants

On April 9, 2009, the U.S. Court of Appeals for the District of Columbia Circuit affirmed a district court's judgment dismissing a case brought by individuals residing on Taiwan who sought a declaratory judgment that they were non-citizen U.S. nationals and asserted that the United States was exercising sovereignty over Taiwan. *Lin v. United States*, 561 F.3d 502 (D.C. Cir. 2009). *See* Chapter 9.B. for further discussion.

2. Derivative Citizenship for Children Born Outside the United States

a. Proof of paternal relationship through DNA testing

On August 31, 2009, the U.S. District Court for the Southern District of Texas dismissed a case for lack of subject matter jurisdiction and failure to state a claim. *Parham v. Clinton*, Civ. No. H-09-1105, 2009 WL 2870671 (S.D. Tex., Aug. 31, 2009). The case arose from the Department of State's request that two children conceived out of wedlock and born to a non-U.S. citizen outside the United States undergo DNA testing to prove their eligibility for U.S. citizenship. The plaintiffs, a U.S. citizen (individually and as "next friend" of two children) and his Philippine national wife, claimed in part that consular officials at the U.S. Embassy in the Philippines and the Department of State violated their rights by refusing to grant Consular Reports of Birth Abroad for their two children and requiring DNA testing to prove a biological relationship between the U.S. citizen and each of the children. The plaintiffs sought a declaratory judgment that the children's parentage had been established, a court order directing the State Department to issue a Consular Report of Birth Abroad and passports for the children, and other relief and damages. For the reasons discussed in its memorandum and order, the court dismissed the case for lack of jurisdiction or, in the alternative, for failure to state a claim on which relief can be granted. Excerpts below from the court's memorandum and order discuss the legal framework and procedures applicable to proving citizenship at birth for individuals born abroad. The U.S. motion to dismiss,

filed on June 19, 2009, is available at *www.state.gov/s/l/c8183.htm*. The plaintiffs' appeal to the U.S. Court of Appeals for the Fifth Circuit was pending at the end of 2009.*

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A. Citizenship at Birth for Individuals Born Abroad

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By statute, a person who is born abroad automatically becomes a national and citizen of the United States if both parents are United States citizens and at least one of the parents has had a residence in the United States or one of its outlying possessions prior to the birth of such person. 8 U.S.C. § 1401(c). If one parent is not a United States citizen, however, a person who is born abroad may still acquire United States citizenship if the other parent is a United States citizen who has been physically present within the United States for a sufficient length of time prior to the birth. *See* 8 U.S.C. § 1401(g). Congress has delegated the responsibility for administering and enforcing the law relating to nationality to the Secretary of State, whose authority extends to "the determination of nationality of a person not in the United States." 8 U.S.C. § 1104(a). A person's "nationality" in this context is defined to mean citizenship. 22 C.F.R. § 50.1(d) (2009) (defining "national" to mean "a citizen of the United States or a noncitizen owing permanent allegiance to the United States"). . . .

Claims to United States citizenship for persons born abroad are made through an application for registration or a passport, or through an application for a Consular Report of Birth Abroad of a Citizen of the United States of America. 22 C.F.R. § 50.2. Determinations of citizenship may be made abroad by a consular officer or a designated nationality examiner who may approve or disapprove an application for registration or for a passport. *Id.* A Consular Report of Birth Abroad may only be issued by a consular officer . . . and such report will issue only if the consular officer is "satisfied that the claim to nationality has been established." *Id.* The applicant seeking a Consular Report of Birth Abroad must submit proof of the child's birth, identity, and citizenship in compliance with the requirements set forth in the regulations governing passports. *See id.* at § 50.5 (referencing 22 C.F.R. Part 51, Subpart C). Under this section, the applicant has the burden of proving that he or she is a United States citizen. *See id.* at § 51.40. The applicant must provide documentary evidence in support of a claim that he or she is a United States citizen. *Id.* at § 51.41. In addition to the requisite forms of documentary evidence, a State Department official may, as a matter of discretion, "require an applicant to provide *any evidence* that it deems necessary to establish that he or she is a [United States] citizen[.]" *Id.* at 51.45 (emphasis added)[.] A consular official "may issue" a Consular Report of Birth Abroad only upon application and the submission of "satisfactory proof of birth, identity and nationality[.]" *Id.* at § 50.7(a).

To assist consular officials with making determinations regarding applications for citizenship abroad, the United States Department of State provides guidelines in its Foreign Affairs Manual. The State Department's Foreign Affairs Manual deems proof of a "blood relationship" essential to establishing citizenship where a claim is made by a person born abroad:

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* Editor's note: On March 17, 2010, the U.S. Court of Appeals for the Fifth Circuit upheld the dismissal for lack of subject matter jurisdiction and failure to state a claim. *Parham v. Clinton*, 374 Fed. Appx. 503 (5th Cir. 2010); 2010 WL 1141638 (5th Cir. Appx. 2010).

> The laws on acquisition of United States citizenship through a parent have always contemplated the existence of a blood relationship between the child and the parent(s) through whom citizenship is claimed. It is not enough that the child is presumed to be the issue of the parents' marriage by the laws of the jurisdiction where the child was born. Absent a blood relationship between the child and parent on whose citizenship the child's own claim is based, United States citizenship is not acquired. The burden of proving a claim to United States citizenship, including blood relationship and legal relationship, where applicable, is on the person making such claim.

7 U.S. Department of State, Foreign Affairs Manual § 1131.4-1(a). Although children born in wedlock "are generally presumed to be the issue of that marriage," the presumption is not determinative in citizenship cases, where "an actual blood relationship to a United States citizen is required." *Id.* at § 1131.4-1(c). In determining the existence of a blood relationship for persons born in wedlock, the State Department applies a preponderance-of-the-evidence standard, in which "evidence of blood relationship is of greater weight than the evidence to the contrary." *Id.* at § 1131.4-1(b)(1). Where a child has been conceived out of wedlock, as [the children] were in this instance, a consular official may investigate to determine the possibility of "paternity fraud." *Id.* at § 1131.5-3(a)(1). To resolve doubts about paternity, a consular officer may request "blood or DNA testing." *Id.* at 1131.5-3(b)(4).

The plaintiffs in this case complain that DNA testing is not expressly authorized by statute and that the defendants' request for proof of paternity is unnecessary. According to information supplied by the defendants, and the foregoing legal standards, consular officials are "required by law to note evidence of transmission, legitimation, and filiation." (Doc. # 5, Declaration of Edward A. Betancourt). For this purpose, the State Department regularly requires DNA testing of children in cases such as [this one], because such testing "is standard practice worldwide in a case where the children were conceived before the date of marriage." (*Id.*). . . .

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b. Out-of-wedlock children

> On September 28, 2009, the U.S. District Court for the Middle District of Florida granted the government's motion to dismiss a case brought by a plaintiff born out of wedlock outside the United States. *Retuya v. Chertoff*, Case No. 8:08-CV-935-T-17EAJ (M.D. Fla. 2009). The plaintiff alleged that the Department of State had violated her rights to due process and equal protection under the Fifth Amendment to the U.S. Constitution when a consular official at the U.S. Embassy in the Philippines denied her application for derivative citizenship on the grounds that she was not legitimated under U.S. or Philippines law before the age of 21. The court found that a Florida court order of paternity entered after the applicant was 21 but deemed "retroactive" by the Florida court was insufficient to satisfy the requirement of "legitimation" before the age of 21 contained in 8 U.S.C.

§ 1409. The U.S. motion to dismiss, filed on August 1, 2008, explained § 1409(a) as follows:

> . . . The version of § 1409(a) that controls in this case, commonly referred to as "old" § 1409(a), provides that a child born out of wedlock outside the United States to a father who is a United States citizen shall likewise be deemed a citizen "if the paternity of such child is established *while* such child is under the age of twenty-one years by legitimation." 8 U.S.C. § 1409(a) (1985) (amended by the Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655 (1986) (emphasis added).[3]

The court also rejected the plaintiff's equal protection, due process, res judicata, and collateral estoppel claims. The court also held that passport issuance was not subject to mandamus in the case and reaffirmed the principle "that passport issuance is a discretionary function exclusively reserved to the Executive Branch. *Haig v. Agee*, 453 U.S. 280, 293 (1981)." *Retuya v. Chertoff*, Case No. 8:08-CV-935-T-17EAJ, at 9. The U.S. motion to dismiss, the U.S. reply in support of the motion to dismiss, and the court's unpublished order are available in full at *www.state.gov/s/l/c8183.htm*.

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[3] The 1986 amendments changed the citizenship requirements for an out of wedlock child born abroad to a citizen father as follows:

(1) a blood relationship between the person and the father is established by clear and convincing evidence,

(2) the father had the nationality of the United States at the time of the person's birth,

(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and

(4) while the person is under the age of 18 years—

(A) the person is legitimated under the law of the person's residence or domicile,

(B) the father acknowledges paternity of the person in writing under oath, or

(C) the paternity of the person is established by adjudication of a competent court.

Pub. L. No. 99-653, § 13(a), 100 Stat. 3655. Congress further provided that "an individual who is at least 15 years of age, but under 18 years of age as of the date of enactment of this Act may elect to have the old section 309(a) apply to the individual instead of the new section 309(a)." Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 8(r), 102 Stat. 2609 (1988). Plaintiff here seeks to proceed under old § 1409(a). Complaint ¶¶ 24, 27.

B. PASSPORTS

On July 6, 2009, the U.S. Court of Appeals for the District of Columbia Circuit affirmed a district court's judgment dismissing a lawsuit brought on behalf of a U.S. citizen child born in Jerusalem to compel the State Department to record "Israel" (rather than "Jerusalem") as the child's birthplace in his passport and Consular Report of Birth Abroad. *Zivotofsky v. Secretary of State*, 571 F.3d 1227 (D.C. Cir. 2009). *See* Chapter 9.C. for discussion.

C. IMMIGRATION AND VISAS

1. Special Immigrant Visas for Afghans

Section 602(b) of the Afghan Allies Protection Act of 2009 authorizes 1,500 special immigrant visas annually for certain Afghans for fiscal years 2009 through 2013. Div. F, Title VI, Pub. L. No. 111-8, 123 Stat. 807. To be eligible, an Afghan must have been employed by or on behalf of the U.S. government in Afghanistan on or after October 7, 2001, for a period of not less than one year, have provided "faithful and valuable service" to the U.S. government, and have experienced or be experiencing "an ongoing serious threat as a consequence of that employment." Spouses and children of eligible Afghans also may receive the visas if they are accompanying or joining the principal visa holder. *See* *http://travel.state.gov/visa/immigrants/info/info_4495.html*.

2. Visas and Temporary Admission for Nonimmigrant Aliens Infected with HIV

On October 30, 2009, President Barack H. Obama announced that the United States would no longer bar people with HIV from entering the United States, effective in early 2010. President Obama stated:

> Twenty-two years ago, in a decision rooted in fear rather than fact, the United States instituted a travel ban on entry into the country for people living with HIV/AIDS. Now, we talk about reducing the stigma of this disease, yet we've treated a visitor living with it as a threat. We lead the world when it comes to helping stem the AIDS pandemic, yet we are one of only a dozen countries that still bar people [with] HIV from entering our own country.

> If we want to be the global leader in combating HIV/AIDS, we need to act like it. And that's why on Monday my administration will publish a final rule that eliminates the travel ban effective just after the New Year. Congress and President Bush began this process last year, and they ought to be commended for it. We are finishing the job. . . .
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> *See* Daily Comp. Pres. Docs., 2009 DCPD No. 00864, pp. 2–3.

On November 2, 2009, the U.S. Department of Health and Human Services published the final rule. 74 Fed. Reg. 56,547 (Nov. 2, 2009). Excerpts below from the summary and the preamble to the final rule provide additional information on the new rule and the legislative and regulatory history of the HIV-related prohibition.

Through this final rule, the Centers for Disease Control and Prevention (CDC), within the U.S. Department of Health and Human Services (HHS), is amending its regulations to remove "Human Immunodeficiency Virus (HIV) infection" from the definition of *communicable disease of public health significance* and remove references to "HIV" from the scope of examinations for aliens.

Prior to this final rule, aliens with HIV infection were considered to have a *communicable disease of public health significance* and were thus inadmissible into the United States per the Immigration and Nationality Act (INA). While HIV infection is a serious health condition, it is not a communicable disease that is a significant threat for introduction, transmission, and spread to the U.S. population through casual contact. As a result of this final rule, aliens will no longer be inadmissible into the United States based solely on the ground that they are infected with HIV, and they will not be required to undergo HIV testing as part of the required medical examination for U.S. immigration.

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II. Background

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B. Legislative and Regulatory History

Beginning in 1952, the language of the INA mandated that aliens "who are afflicted with any dangerous contagious disease" are ineligible to receive a visa and are to be excluded from admission into the United States. In April 1986, prior to the recent developments in medicine and epidemiologic principles, HHS published a proposal in the *Federal Register* to include *acquired immunodeficiency syndrome (AIDS)* as a dangerous contagious disease. *See* 51 FR 15354 (April 23, 1986). In June 1987, HHS published a final rule adopting this proposal. *See* 52 FR 21532 (June 8, 1987). Also during this time, HHS separately published a proposed rule to substitute HIV infection for AIDS on the list of dangerous contagious diseases. *See* 52 FR 21607 (June 8, 1987). While this proposed rule was pending public comment, Congress added HIV infection to the list of dangerous contagious diseases. Public Law 100-71, section 518, 101 Stat. 475 (July 11, 1987). HHS issued final regulations in August of that year complying with the congressional mandate. 52 FR 32540 (August 28, 1987). In response to the congressional mandate, HHS issued final regulations to that

effect in August of that year. *See* 52 FR 32540 (August 28, 1987). Accordingly and immediately, aliens infected with HIV became ineligible to receive visas and were excluded from admission into the United States. *See* INA section 212(a)(6), 8 U.S.C. 1182(a)(6)(1988).

In 1990, Congress amended the INA by revising the classes of excludable aliens to provide that an alien who is determined (in accordance with regulation[s] prescribed by the Secretary of Health and Human Services) to have a *communicable disease of public health significance* is excludable from the United States. Immigration Act of 1990, Public Law 101-649, section 601, 104 Stat. 4978 January 23, 1990; INA section 212(a)(1)(A)(i), 8 U.S.C. 1182(a)(1)(A)(i) (effective June 1, 1991). HHS/CDC subsequently published a proposed rule that would have removed from the list all diseases, including HIV infection, except for infectious tuberculosis. *See* 56 FR 2484 (January 23, 1991). Based on public comments received on this proposal, and after reconsideration of the issues, HHS published an interim final rule retaining all diseases on the list, including HIV infection, and committed its initial proposal for further study. *See* 56 FR 25000 (May 31, 1991). Congress subsequently amended INA section 212(a)(1) to specify that "infection with the etiologic agent for acquired immune deficiency syndrome" is a *communicable disease of public health significance*, thereby making explicit in the INA that aliens with HIV are ineligible for admission into the United States. National Institutes of Health Revitalization Act of 1993, Public Law 103-43, section 2007, 107 Stat. 122 (June 10, 1993).

In summer 2008, Congress amended the INA by striking "which shall include infection with the etiologic agent for acquired immune deficiency syndrome," thereby leaving to the Secretary of HHS the discretion for determining whether HIV should remain in the definition of *communicable disease of public health significance* provided for in 42 CFR 34.2(b). [Tom Lantos and Henry Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, Pub. Law 110-293, section 305, 122 Stat. 2963 (July 30, 2008).]

In a separate action on October 6, 2008, HHC/CDC published an Interim Final Rule (IFR) announcing a revised definition of *communicable disease of public health significance* and revised scope of the medical examination in 42 CFR part 34. This IFR addressed concerns regarding emerging and reemerging diseases in immigrant and refugee populations who are bound for the United States. *See* 73 FR 58047 and 73 FR 62210. With the revision to 42 CFR Part 34, the definition of *communicable disease of public health significance* was modified to include two disease categories: (1) Quarantinable diseases designated by Presidential Executive Order; and (2) a communicable disease that may pose a public health emergency of international concern in accordance with the International Health Regulations of 2005, provided the disease meets specified criteria. Specific illnesses remaining as a *communicable disease of public health significance* were active tuberculosis, infectious syphilis, gonorrhea, infectious leprosy, chancroid, lymphogranuloma venereum, granuloma inguinale, and HIV infection.

In response to the 2008 amendment to the INA, on July 2, 2009, HHS/CDC published a Notice of Proposed Rule Making (NPRM), which proposed two regulatory changes: (1) The removal of HIV infection from the definition of *communicable disease of public health significance*; and (2) removal of references to serologic testing for HIV from the scope of examinations.

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3. Exempting Certain Aliens from INA Terrorism-related Provisions

On September 21, 2009, Secretary of State Hillary Rodham Clinton and Secretary of Homeland Security Janet Napolitano exercised their discretion in accordance with their authorities under § 212(d)(3)(B)(i) of the INA, as amended, 8 U.S.C. § 1182(d)(3)(B)(i), to conclude that most of the terrorism-related bars to admission under the INA would not apply to certain aliens, for any activity or association relating to the Iraqi National Congress, the Kurdistan Democratic Party ("KDP"), or the Patriotic Union of Kurdistan ("PUK"). The determination concerning each organization provided the criteria that U.S. Citizenship and Immigration Services ("UCSIS"), in consultation with U.S. Immigration and Customs Enforcement ("ICE"), or U.S. consular officers, as applicable, would apply in assessing a particular alien's eligibility for the exemption. Excerpts below from one of the determinations provide the criteria for determining an alien's eligibility for the exemption. For additional background on the applicable statutory framework, see *Digest 2007* at 70 or *Digest 2008* at 29–30.

The Secretary of Homeland Security and the Secretary of State, following consultations with the Attorney General, hereby conclude, as a matter of discretion in accordance with our respective authorities under section 212(d)(3)(B)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(d)(3)(B)(i), as amended, as well as the foreign policy and national security interests deemed relevant in these consultations, that section 212(a)(3)(B) of the INA, excluding subclause (i)(II), shall not apply, with respect to an alien, for any activity or association relating to the Iraqi National Congress (INC), provided that the alien satisfies the relevant agency authority that the alien:

(a) is seeking a benefit or protection under the INA and has been determined to be otherwise eligible for the benefit or protection;

(b) has undergone and passed relevant background and security checks;

(c) has fully disclosed, in applications and/or interviews with U.S. government representatives and agents, the nature and circumstances of activities or associations falling within the scope of section 212(a)(3)(B) of the INA, 8 U.S.C. 1182(a)(3)(B);

(d) has not participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons;

(e) poses no danger to the safety and security of the United States; and

(f) warrants an exemption from the relevant inadmissibility provision in the totality of the circumstances.

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4. First Amendment Challenges to Visa Denials

On July 17, 2009, the U.S. Court of Appeals for the Second Circuit vacated and remanded a district court's decision in a case challenging the Department of State's denial of a visa for Tariq Ramadan, whose visa was revoked in 2006 when he sought to come to the United States to assume a teaching position at the University of Notre Dame and who subsequently was denied a visa when he sought to travel for various speaking engagements. *American Academy v. Napolitano*, 573 F.3d 115 (2d Cir. 2009). The organizations that had invited Ramadan to speak in the United States brought the lawsuit under the First Amendment to the U.S. Constitution. For prior developments in the case, see *Digest 2006* at 18–29 and *Digest 2007* at 19–26.

The court held that jurisdiction existed to address the First Amendment challenges to the visa denial and, citing *Kleindeinst v. Mandel*, 408 U.S. 753 (1972), required the government to articulate a "facially legitimate and bona fide reason" for the alien's exclusion. The court held that this standard is met if the consular officer's decision is consistent with the statutory ground of inadmissibility on which he relied, such that the court may determine that the officer applied the provision validly, and there are no well-supported allegations of bad faith on the consular officer's part.

In this case, the consular officer denied Ramadan's visa under § 212(a)(3)(B)(iv)(VI)(dd) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd), because he provided material support to two undesignated terrorist organizations (both of which the Treasury Department subsequently designated under Executive Order 13224 as entities that support terrorism). The court noted that the applicable INA provision renders an alien inadmissible for such acts, unless the alien demonstrates by clear and convincing evidence that he did not know, and should not reasonably have known, that the recipient was a terrorist organization. In reviewing the record relative to the various elements of that ground for inadmissibility, the court concluded that:

> . . . the statutory provision expanding visa ineligibility to those who contributed funds to an undesignated terrorist organization before the provision was enacted was validly applied to Ramadan; the knowledge requirement of the statute required the consular officer to find that Ramadan knew his contributions provided material support; and the consular officer was required to confront Ramadan with the allegation against him and afford him the subsequent opportunity to demonstrate by clear and convincing evidence that he did not know, and reasonably should not have known, that the recipient of his contributions was a terrorist organization. . . .

American Academy v. Napolitano, 573 F.3d at 118. In conducting "the limited review permitted by *Mandel,*" the court concluded that the record did not establish that the consular officer confronted Ramadan with the allegations supporting denial or gave Ramadan the required opportunity to satisfy his burden. *Id.*

Therefore, the court remanded the case to enable the government to determine whether the consular officer could assure the district court that he or she had confronted Ramadan with the allegations supporting denial and "and provided him some opportunity thereafter to negate such knowledge, or, if not, to conduct a renewed visa hearing now that Ramadan is aware of the knowledge he must negate." *Id.* at 134.

Litigation also continued in 2009 in the U.S. District Court for the District of Massachusetts, in another First Amendment challenge to a visa denial. The case arose after a consular officer denied a visa to Adam Habib, a South African professor, on the basis of 8 U.S.C. § 1182(a)(3)(B)(i)(I). *Habib v. Chertoff*, 588 F. Supp. 2d 166 (D. Mass. 2008) (denying U.S. motion to dismiss but dismissing Michael Chertoff as a defendant and dismissing Habib as a plaintiff and granting U.S. motion to stay the plaintiffs' motion for summary judgment).[*]

5. Expulsion of Aliens

On October 30, 2009, Mark A. Simonoff, Counselor, U.S. Mission to the United Nations, addressed the UN General Assembly's Sixth (Legal) Committee on the report of the International Law Commission ("ILC" or "Commission") on the work of its sixty-first session. Excerpts follow from Mr. Simonoff's statement, discussing the ILC's draft articles addressing the expulsion of aliens. The full text of the U.S. statement is available at *www.state.gov/s/l/c8183.htm*; the ILC report is available at *http://untreaty.un.org/ilc/reports/2009/2009report.htm*.

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The United States would like to express its appreciation for the continued efforts of Special Rapporteur [Maurice] Kamto on the topic of Expulsion of Aliens. The issues addressed by the

[*] Editor's note: On January 25, 2010, Secretary of State Clinton exercised her discretionary authority under § 212(d)(3)(B)(i) of the INA, following consultations with the Department of Homeland Security and the Department of Justice, to grant exemptions for Ramadan and Habib, for purposes of any application for non-immigrant visa and for admission as a non-immigrant, establishing that neither would be found inadmissible on the basis of the facts underlying their previous visa denials. *Digest 2010* will provide additional discussion of relevant aspects of Secretary Clinton's determination.

Rapporteur are complicated ones and we encourage the Rapporteur and other members of the Commission as well as other States to carefully review the draft articles concerning the human rights of aliens subject to expulsion. As the scope of this project continues to expand, our concerns about the possibility that these draft articles could unduly restrain the sovereign rights enjoyed by States to control admission to their territories and to enforce their immigration laws are even more acute. Today I would like to highlight a few issues that demonstrate the need for careful attention to these draft articles.

As a preliminary matter, we would like to highlight an issue regarding methodology and the appropriate sources of international law. We would hope that rather than attempting to articulate new rights specific to the expulsion context and importing concepts from regional jurisprudence (e.g., from the European Commission and Court), reference would be made instead to well-settled principles of law reflected in the precise text of broadly ratified global (i.e., U.N.) human rights conventions.

Additionally, these new draft articles on human rights highlight the need to further refine the scope of these draft articles. We have previously emphasized the need to clarify that decisions to deny entry do not properly fall within the scope of these draft articles, and that they should not apply to matters governed by specialized bodies of law such as extraditions or other transfers for law enforcement purposes or to expulsions of aliens in situations of armed conflict. For example, extradition must be excluded from the scope of the draft articles; extradition is not expulsion, but the transfer of an individual—both aliens and nationals—for a specific law enforcement purpose. Far from codifying rules of customary international law in this area, many of the proposals would purport to amend the settled practices and obligations of States under multilateral and bilateral extradition treaty regimes. Additionally, it appears that more thought is needed as to how these rules would apply in the situation of an armed conflict.

We have further concerns about the scope of the draft articles regarding the rights of persons who have been expelled. In our view, as a general matter and consistent with the framework adopted in international human rights treaties, these draft articles should apply to individuals within the territory of a State who are subject to a State's jurisdiction. States should not be placed in the situation of being responsible for anticipating conduct by third parties that is beyond their forseeability or control.

Regarding draft article 10, while we of course recognize the importance of including a non-discrimination principle in these draft articles, it should be clear that it applies only to the process afforded to aliens in expulsion proceedings, and should not unduly restrain the discretion enjoyed by States as a result of their sovereign rights to control admission to their territories and to establish grounds for expulsions of aliens under their immigration laws.

Regarding concerns over family unity, the draft article on this subject appears to be based on the emerging jurisprudence of the European Court. In this area and elsewhere we would recommend referring instead to the text of the International Covenant on Civil and Political Rights as well as to state practice to determine how to articulate the scope of the obligations of States.

Finally, we are particularly troubled by Mr. Kamto's incorporation of non-refoulement obligations into numerous provisions, both indirectly by, as previously noted, extending protections to "persons who have been . . . expelled" in the various provisions and explicitly in draft articles 14 and 15. The Special Rapporteur relies on non-binding opinions of the Human Rights Committee and jurisprudence of the European Court of Human Rights to interpret a non-refoulement obligation and a requirement for assurances against the death penalty into rights where none is expressly provided in the actual texts of Article 6 and 7 of the International Covenant on Civil and Political Rights or

any other U.N. convention. Moreover, we are concerned about the proposed obligation in draft article 14 regarding ensuring respect for . . . "personal liberty in the receiving State" as this term is undefined and goes beyond existing obligations regarding non-refoulement assumed by States as parties to global (i.e., U.N.) conventions. Finally, draft article 15(2)'s extension of the non-refoulement protection to protect against risks "emanat[ing] from persons or groups of persons acting in a private capacity" goes far beyond even the express non-refoulement protection regarding torture contained in Article 3 of the CAT [Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment].

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Cross References

Protection of migrants, **Chapter 6.D.6.**
U.S. legislation on child soldiers and grounds of inadmissibility under the Immigration and Nationality Act, **Chapter 6.G.**
Travel-related restrictions, **Chapter 16.A.1.a.(1), 2.a., 3.a., 3.b., 4.c.(2), 4.d., and 4.e.**
Modification of rules concerning travel-related transactions involving Cuba, **Chapter 16.B.1.**